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(1)

Supreme Court, U.S.
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No.

Supreme Court of the United States

MARK RADER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Mark Rader
Petitioner
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Question Presented

Petitioner Mark Rader's sentence was imposed and affirmed by the lower courts based upon the premise that any deviation from the United States Sentencing must be supported by extraordinary circumstances.

When determining the "reasonableness" of a district court sentence under *United States v. Booker*, 543 U.S. 220 (2005), is it appropriate to require district courts to justify a deviation from the United States Sentencing Guidelines with a finding of extraordinary circumstances?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit.

More specifically, the Petitioner Mark Rader and the Respondent United States of America are the only parties. Neither party is a company, corporation, or subsidiary of any company or corporation.

TABLE OF CONTENTS

	Page:
Question Presented	i
List of Parties to the Proceedings in the Courts Below	ii
Table of Contents	iii
Table of Authorities	v
Petition for a Writ of Certiorari	1
Opinions Below	1
Statement of Jurisdiction	2
Constitutional Provisions, Treaties, Statutes, Rules, and Regulations Involved	3
Statement of the Case	6
Reasons for Granting the Writ	15
1.) **THIS COURT SHOULD GRANT MR. RADER'S PETITION FOR WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE UNITED STATES COURTS OF APPEALS AS TO WHETHER IT IS APPROPRIATE TO REQUIRE DISTRICT COURTS TO JUSTIFY A DEVIATION FROM THE UNITED STATES SENTENCING GUIDELINES WITH A FINDING OF EXTRAORDINARY CIRCUMSTANCES**	15
1A.) **The Federal Courts Of Appeals Are Divided As To Whether It Is Appropriate To Require District Courts To Justify A Deviation From The United States Sentencing Guidelines With A Finding Of Extraordinary Circumstances**	16

1B.) The Burden Of Proving The Extraordinary Justification Needed To Sustain A Sufficient, But Not Greater Than Necessary Outside-Guidelines Sentence For Mr. Rader Violated *Booker* And *Rita* And Resulted In The Reimposition Of Mandatory Guidelines In His Case..... 18

Conclusion..... 21

Appendix 22

USCA Opinion Dated 5-31-07 ..... A

USDC Judgment & Commitment Order Entered 2-9-06..... B

TABLE OF AUTHORITIES

Page:

Cases

Bailey v. United States,
516 U.S. ___, 116 S.Ct. 501,
133 L.Ed.2d 472 (1995) *18*

Blakely v. Washington,
124 S. Ct. 2531; 159 L. Ed. 2d 403;
2004 U.S. LEXIS 4573 (6-24-04) *19*

Braxton v. United States,
500 U.S. 344,
114 L.Ed.2d 385, 111 S.Ct. 1854 (1991) *18*

Burns v. United States,
501 U.S. 129, 136-37 (1991) *19*

Gall v. United States,
No. 06-7949; 2007 U.S. LEXIS 7525 (6-11-07).... *17, 20, 21*

Koon v. United States,
518 U.S. 81, 106 (1996) *19*

Montana v. Hall,
481 U.S. 400, 406,
95 L.Ed.2d 354, 107 S.Ct. 1825 (1987) *18*

Rita v. United States,
No. 05-4674; 2007 U.S. LEXIS 8269 (6-21-07) ... *16*

Stinson v. United States,
508 U.S. ___, ___, and [n.],
123 L.Ed.2d 598, 605 and [n. 2],
113 S.Ct. 1913 (1993) *18*

United States v. Armendariz,
451 F.3d 352, 358 (5th Cir. 2006) *17*

United States v. Bishop,
469 F.3d 896, 907 (10th Cir. 2006) *17*

United States v. Booker,
543 U.S. 220, 125 S. Ct. 738; 160 L. Ed. 2d 621;
2005 U.S. LEXIS 628 (1-12-05) ..... *passim*

United States v. Crisp,
454 F.3d 1285, 1291-1292 (11th Cir. 2006) *17*
United States v. Dalton,
404 F.3d 1029, 1033 (8th Cir. 2005) *17*
United States v. Davis,
458 F.3d 491, 496 (6th Cir. 2006) *17*
United States v. Dean,
414 F.3d 725, 729 (7th Cir. 2005) *17*
United States v. Howard,
454 F.3d 700, 703 (7th Cir. 2006) *17*
United States v. Hunt,
459 F.3d 1180, 1182 n.3 (11th Cir. 2006) *10*
United States v. Mark Rader,
2007 U.S. App. LEXIS 12791
(11th Cir. 5-31-07) *14, 16*
United States v. Matheny,
450 F.3d 633, 642 (6th Cir. 2006) *17*
United States v. Mendoza,
464 U.S. 154, 78 L.Ed.2d 379,
104 S.Ct. 568 (1984) *18*
United States v. Moreland,
437 F.3d 424, 433 (4th Cir. 2006) *17*
United States v. Moreland,
437 F.3d 424, 434 (4th Cir. 2006) *17*
United States v. Myers,
439 F.3d 415, 417 (8th Cir. 2006) *17*
United States v. Smith,
445 F.3d 1, 4 (1st Cir. 2006) *17*
United States v. Talley,
431 F.3d 784, 786 (11th Cir. 2005) *11*
United States v. Williams,
456 F.3d 1353, 1360-61 (11th Cir. 2006) *11*
United States v. Winingear,
422 F.3d 1241, 1245 (11th Cir. 2005) *10*

Statutes

18 U.S.C. § 2252(a)(1) ..... *passim*
18 U.S.C. § 2252(a)(5)(B) ..... *passim*

18 U.S.C. § 2252(b)(1) *7*
18 U.S.C. § 2252A(a)(5)(B) *10*
18 U.S.C. § 2252A(b)(1) *8*
18 U.S.C. § 2422(b) ..... *passim*
18 U.S.C. § 3553(a) ..... *passim*
18 U.S.C. § 3553(b)(1) *18*
28 U.S.C. § 1254(1) *2*

Other Authorities

U.S.C.A. Fifth Amendment *3*
U.S.C.A. Sixth Amendment *3, 20*
U.S.S.G § 3E1.1 ..... *7*

Rules

Supreme Court Rule 10 ..... *15, 16*
Supreme Court Rule 10(a) *17*

PETITION FOR A WRIT OF CERTIORARI

Mark Rader, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered in the above entitled case on 5-31-07.

OPINIONS BELOW

The 5-31-07 opinion of the Court of Appeals for the Eleventh Circuit, whose judgment is herein sought to be reviewed, is an unpublished decision reported at 2007 U.S. App. LEXIS 12791 and is reprinted in the separate Appendix A to this Petition.

The prior opinion and judgment (Judgment & Commitment Order) of the United States District Court for the Southern District of Florida, entered on 2-9-06, is an unpublished decision, and is reprinted in the separate Appendix B to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on 5-31-07. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ... *Id.*

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. *Id.*

18 U.S.C. § 3553(a)provides:

> § 3553. Imposition of a sentence
>
> (a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in

determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g) [18 USCS § 3742(g)], are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the

Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g) [18 USCS § 3742(g)], is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense. *Id.*

STATEMENT OF THE CASE

On or about 6-16-05 Mark Rader was charged in an indictment in the Southern District of Florida, in Criminal Case No. 2:05-CR-14047-JEM, with violation of 18 U.S.C. § 2252(a)(1) ("transport or mail a visual depiction, in interstate commerce, by any means, including by computer, the production of which visual depictio involves the use of a minor engaging in sexually explicit conduct, and such visual depiction is of such sexually explicit conduct" on or about 5-18-05) (Indictment Count 1); 18 U.S.C. § 2422(b) ("using a facility and means of interstate commerce, that is, Yahoo!, an internet service provider, knowingly persuaded, induced, enticed or coerced an individual who had not attained the age of eighteen years, to engage in sexual activity under such circumstances as would constitute a criminal offense, or attempted to do so") (Indictment, Count 2).

The enticement charge arose from the use of an undercover agent operating in an internet chat-room and a couple of phone conversations with the agent and a female undercover assistant which was construed as enticement of a minor to engage in sexual activity

He was arraigned on or about 6-22-05 at which time he pleaded not guilty to the charged violations.

On or about 9-1-05, Mark Rader was charged in an "Information" in the Northern District of Texas with violation of 18 U.S.C. § 2252(a)(5)(B) (possession of *deleted* images of child pornography on or about 5-31-05) (Information Count 1); 18 U.S.C. § 2252(a)(5)(B) ('possession' of an on-line video of child pornography on or about 5-18-05) (Information Count 2).

The child pornography charges arose from possession of deleted images of child pornography on a computer at his home and a single act of facilitating the sharing of an on line video containing child pornography with an undercover agent via the internet.

The charges from the Northern District of Texas were subsequently transferred to the Southern District of Florida under Federal Rule of Criminal Procedure 20 at the request of Mr. Rader and the government and were filed as Criminal Case No. 2:05-CR-14077-JEM

On or about 10-11-05, Mr. Rader pleaded guilty to violations of 18 U.S.C. § 2252(a)(1) ("transport or mail a visual depiction, in interstate commerce, by any means, including by computer, the production of which visual depiction involves the use of a minor engaging in sexually explicit conduct, and such visual depiction is of such sexually explicit conduct" on or about 5-18-05) (Indictment Count 1); 18 U.S.C. § 2422(b) ("using a facility and means of interstate commerce, that is, Yahoo!, an internet service provider, knowingly persuaded, induced, enticed or coerced an individual who had not attained the age of eighteen years, to engage in sexual activity under such circumstances as would constitute a criminal offense, or attempted to do so") (Indictment, Count 2); 18 U.S.C. § 2252(a)(5)(B) (possession of *deleted* images of child pornography on or about 5-31-05) (Information Count 1).

When the Presentence Report was prepared the Probation Officer recommended finding that Mr. Rader's offense level for the possession of child pornography offense was 35 (PSI ¶ 30), and his adjusted offense level for the child enticement offense was 34 (PSI ¶ 37). After a multiple count adjustment and the acceptance of responsibility adjustment, pursuant to U.S.S.G § 3E1.1, Mr. Rader's total offense level was 34 (PSI ¶¶ 38-47). Mr. Rader had no criminal history points (PSI ¶ 50). His statutory minimum term of imprisonment on Count 1 of the superseding indictment was five years and the maximum term was 20 years, pursuant to 18 U.S.C. § 2252(b)(1) (PSI ¶ 76). His statutory minimum term of imprisonment for Count 2 was five years and the statutory maximum was 30 years of imprisonment, pursuant to 18 U.S.C. § 2422(b) (id.). With respect to the possession of child pornography charge in the information, the term of

imprisonment was 0 to 10 years, pursuant to 18 U.S.C. § 2252A(b)(2) (id.). Based on a total offense level of 34 and a Criminal History Category I, Mr. Rader's guideline imprisonment range was 151 to 188 months' imprisonment (Presentence Report).

Objections to the Presentence Report were prepared and filed by counsel for Mr. Rader. In the objections, counsel asked the court to consider the Mr. Rader's background, including his military service and civilian work history as well as the Mr. Rader's amenability to treatment and rehabilitation. Mr. Rader's sentencing memorandum detailed the exemplary military record of Mr. Rader including his service as a Naval Flight Officer with over 25 years in active duty and the Reserves. Counsel presented evidence of Mr. Rader's numerous commendations during his military career and his extraordinary civic service using his talents as a pilot flying blood and organ deliveries throughout the State of Texas.

As a supplement to the objections, counsel provided a proffer and testimony of a defense expert, Susan Bollinger, Ph.D., FAACS who specialized in forensic mental health and clinical sexology. In the proffer and testimony, Dr. Bollinger presented unrebutted, competent evidence that the acts of Mr. Rader were aberrant conduct and that he did not present a physical danger to anyone either at the time of the charged events or in the future.

On 2-6-06, Mr. Rader appeared for sentencing. At sentencing.

At sentencing, counsel argued strenuously for a "reasonable" sentence under *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738; 160 L. Ed. 2d 621; 2005 U.S. LEXIS 628 (1-12-05) and referenced the strong evidence for a downward variance from the guideline sentencing range which was present in Mr. Rader's case.

A fair reading of the transcript of sentencing demonstrates, however, that the District Court declined to grant a downward variance because Mr. Rader had not

demonstrated extraordinary circumstances to justify a deviation from the United States Sentencing Guidelines. The District Court repeatedly and explicitly pointed out that, in the Court's opinion, the guidelines were entitled to substantial deference above and beyond the factors set forth in 18 U.S.C. § 3553(a).

On 2-6-06, Mr. Rader was sentenced to 151 (151+120 concurrent) months incarceration for violations of 18 U.S.C. § 2252(a)(1) ("transport or mail a visual depiction, in interstate commerce, by any means, including by computer, the production of which visual depiction involves the use of a minor engaging in sexually explicit conduct, and such visual depiction is of such sexually explicit conduct" on or about 5-18-05) (Indictment Count 1); 18 U.S.C. § 2422(b) ("using a facility and means of interstate commerce, that is, Yahoo!, an internet service provider, knowingly persuaded, induced, enticed or coerced an individual who had not attained the age of eighteen years, to engage in sexual activity under such circumstances as would constitute a criminal offense, or attempted to do so") (Indictment, Count 2); 18 U.S.C. § 2252(a)(5)(B) (possession of *deleted* images of child pornography on or about 5-31-05) (Information Count 1). This sentence represented concurrent 151-month terms on the first two offenses and a 120-month term for possession of child pornography. (Appendix A) (Appendix B)

The judgment was entered on 2-9-06.

On 2-14-06, a Notice of Appeal was filed. On direct appeal, counsel specifically argued that Mr. Rader's sentence was "unreasonable" under *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738; 160 L. Ed. 2d 621; 2005 U.S. LEXIS 628 (1-12-05) because the District Court failed to properly weigh and consider the factors set forth in 18 U.S.C. § 3553(a).

On 5-31-07, the Court of Appeals denied Mr. Rader's appeal. In denying the appeal, the Court of Appeals held, *inter alia*,

Pursuant to a plea agreement, Mark Todd Rader pleaded guilty to one count of transporting or mailing a visual depiction the production of which involves the use of a minor engaging in sexually explicit conduct, in violation of 18 U.S.C. § 2252(a)(1), one count of using a facility and means of interstate commerce to persuade, induce, entice, or coerce a minor to engage in sexual activity, in violation of 18 U.S.C. § 2422(b), and one count of possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B). Rader appeals [*2] his 151-month sentence, which consists of concurrent 151-month terms on the first two offenses and a 120-month term for possession of child pornography. Rader argues that his sentence was not reasonable because the record does not demonstrate that the court considered the factors in 18 U.S.C. § 3553(a) and the meritorious sentencing arguments. He further challenges the reasonableness of his sentence on the ground that the district court did not adequately consider his history and characteristics.

* * * * * * * * * * *

We review the final sentence imposed by the district court for reasonableness. *United States v. Winingear*, 422 F.3d 1241, 1245 (11th Cir. 2005). Unreasonableness may be procedural, when the court's [*3] procedure does not follow *Booker's*[1] requirements, or substantive. See *United States v. Hunt*, 459 F.3d 1180, 1182 n.3 (11th Cir. 2006). When

[1] *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

evaluating the reasonableness of a sentence, we consider the factors outlined in 18 U.S.C. § 3553(a) and the district court's reasons for imposing the particular sentence. *United States v. Williams*, 456 F.3d 1353, 1360-61 (11th Cir. 2006), pet. for cert. filed, (U.S. Oct. 19, 2006) (No. 06-7352). When imposing a sentence, the district court must first correctly calculate the Guidelines. *United States v. Talley*, 431 F.3d 784, 786 (11th Cir. 2005). Second, the district court must consider the following factors to determine a reasonable sentence:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (3) the need for deterrence; (4) the need to protect the public; (5) the need to provide the defendant with needed educational or vocational training or medical care; (6) the kinds [*4] of sentences available; (7) the Sentencing Guidelines range; (8) pertinent policy statements of the Sentencing Commission; (9) the need to avoid unwanted sentencing disparities; and (10) the need to provide restitution to victims.

Id. (citing 18 U.S.C. § 3553(a)). While the district court must consider the § 3553(a) factors, it is not required to discuss each factor. *Id.* "[A]n acknowledgment by the district court that it has considered the

defendant's arguments and the factors in section 3553(a) is sufficient under *Booker*." *Id.*

"[T]here is a range of reasonable sentences from which the district court may choose" and the burden of establishing that the sentence is unreasonable in light of the record and the § 3553(a) factors lies with the party challenging the sentence. *Id.* at 788. "The weight to be accorded any given § 3553(a) factor is a matter committed [*5] to the sound discretion of the district court[,]" and we will not "substitute our judgment in weighing the relevant factors because our review is not de novo." *Williams*, 456 F.3d at 1363 (citation, quotation marks, and alteration omitted). Although a sentence within the Guidelines range is not per se reasonable, the use of the Guidelines remains central to the sentencing process and we ordinarily expect a sentence within the Guidelines range to be reasonable. *Talley*, 431 F.3d at 787-88. However, the district court's choice of a sentence is not unfettered. *Williams*, 456 F.3d at 1363. "When reviewing the length of a sentence for reasonableness, we will remand for resentencing if we are left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case." *Id.*

With regard to the procedural reasonableness of Rader's sentence, the district court stated that it considered the statements of the parties, the presentence investigation

report ("PSI"), the [*6] objections, the matters discussed at sentencing, Dr. Susan Bollinger's evaluation and her testimony regarding Rader, the advisory Guidelines, ***which the court believed must be given great weight***, and the § 3553(a) factors. The district court's analysis of the § 3553(a) factors was sufficient. See *Talley*, 431 F.3d at 786 ("[A]n acknowledgment by the district court that it has considered the defendant's arguments and the factors in section 3553(a) is sufficient under Booker.").

Rader has not met his burden of establishing that his sentence is substantively unreasonable. On appeal, Rader points to his military and civilian careers, his mental and physical conditions, and the evidence he presented that his conduct in committing these offenses was an aberration from his character. The district court was presented with arguments and evidence in support of Rader's good character and the problems he experienced, which he claimed contributed to his aberrant behavior in this offense. Although presented with this evidence, the court was entitled to give greater weight to other § 3553(a) factors. See *Williams*, 456 F.3d at 1363 ("The weight to be accorded [*7] any given § 3553(a) factor is a matter committed to the sound discretion of the district court."). The court rejected the government's request for a sentence at the middle of the 151 to 188-month Guidelines range. Instead, Rader received a sentence at the low end of the Guidelines. The court explicitly discussed the advisory Guidelines and the need to deter Rader from future criminal conduct.

> Moreover, despite evidence of Rader's good character, the "aberrant" behavior does not consist solely of a few days of conversation with an undercover officer ... In this case, we are not "left with the definite and firm conviction" that the district court's decision to impose a sentence at the low end of the Guidelines was unreasonable. *Williams*, 456 F.3d at 1363 ... AFFIRMED.

United States v. Mark Rader, 2007 U.S. App. LEXIS 12791 (11th Cir. 5-31-07) (emphasis added)

Mr. Rader demonstrates within that this Court should grant his Petition For Writ Of Certiorari to resolve a conflict among the United States courts of appeals as to whether it is appropriate to require district courts to justify a deviation from the United States Sentencing Guidelines with a finding of extraordinary circumstances.

REASONS FOR GRANTING THE WRIT

1.) **THIS COURT SHOULD GRANT MR. RADER'S PETITION FOR WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE UNITED STATES COURTS OF APPEALS AS TO WHETHER IT IS APPROPRIATE TO REQUIRE DISTRICT COURTS TO JUSTIFY A DEVIATION FROM THE UNITED STATES SENTENCING GUIDELINES WITH A FINDING OF EXTRAORDINARY CIRCUMSTANCES.**

Supreme Court Rule 10 provides in relevant part as follows:

> **Rule 10.**
> **CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI**
>
> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the

> accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision ... *Id.*

Supreme Court Rule 10(a).

1A.) The Federal Courts Of Appeals Are Divided As To Whether It Is Appropriate To Require District Courts To Justify A Deviation From The United States Sentencing Guidelines With A Finding Of Extraordinary Circumstances.

As set forth in the Statement of the Case, supra, the Court of Appeals for the Eleventh Circuit affirmed the District Court decision which denied an outside-guidelines sentence with the explicit reasoning that any variance from the guidelines must be supported by extraordinary circumstances because the Sentencing Guidelines "must be given great weight". (Statement of the Case) *United States v. Mark Rader*, 2007 U.S. App. LEXIS 12791 (11th Cir. 5-31-07) (See Appendix A)

This decision by the Eleventh Circuit reflects the conflict among the circuits as to whether it is appropriate to require district courts to justify a deviation from the United States Sentencing Guidelines with a finding of extraordinary circumstances.[2]

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[2] See *Rita v. United States*, No. 05-4674; 2007 U.S. LEXIS 8269 **30-31 (6-21-07):

> The fact that we permit courts of appeals to adopt a presumption of reasonableness does not mean that courts may adopt a presumption of unreasonableness. Even the Government concedes that appellate courts

This Court has recognized the conflict among the circuits and the uncertainty in the courts below by the Court's grant of certiorari in *Gall v. United States*, No. 06-7949; 2007 U.S. LEXIS 7525 (6-11-07).

This Court has never resolved this question which divides the Courts of Appeals and, as is apparent from the numerous published decisions, the unsettled question is a constantly recurring one which has created much uncertainty in the courts below. The outcome of litigation should not depend on the location of the court in which it occurs. These facts strongly militate for grant of certiorari. See: Supreme Court Rule 10(a). *Montana v. Hall*, 481 U.S. 400, 406, 95

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may not presume that every variance from the advisory Guidelines is unreasonable. See Brief for United States 34-35. Several courts of appeals have also rejected a presumption of unreasonableness. See, e.g., *United States v. Howard*, 454 F.3d 700, 703 (7th Cir. 2006); *United States v. Matheny*, 450 F.3d 633, 642 (6th Cir. 2006); *United States v. Myers*, 439 F.3d 415, 417 (8th Cir. 2006); *United States v. Moreland*, 437 F.3d 424, 433 (4th Cir. 2006). [*31] However, a number of circuits adhere to the proposition that the strength of the justification needed to sustain an outside-Guidelines sentence varies in proportion to the degree of the variance. See, e.g., *United States v. Smith*, 445 F.3d 1, 4 (1st Cir. 2006); *United States v. Moreland*, 437 F.3d 424, 434 (4th Cir. 2006); *United States v. Armendariz*, 451 F.3d 352, 358 (5th Cir. 2006); United States v. Davis, 458 F.3d 491, 496 (6th Cir. 2006); *United States v. Dean*, 414 F.3d 725, 729 (7th Cir. 2005); *United States v. Dalton*, 404 F.3d 1029, 1033 (8th Cir. 2005); *United States v. Bishop*, 469 F.3d 896, 907 (10th Cir. 2006); *United States v. Crisp*, 454 F.3d 1285, 1291-1292 (11th Cir. 2006). We will consider that approach next Term in *United States v. Gall*, No. 06-7949.

L.Ed.2d 354, 107 S.Ct. 1825 (1987); *United States v. Mendoza*, 464 U.S. 154, 78 L.Ed.2d 379, 104 S.Ct. 568 (1984); *Braxton v. United States*, 500 U.S. 344, 114 L.Ed.2d 385, 111 S.Ct. 1854 (1991); *Stinson v. United States*, 508 U.S. ___, ___, and [n.], 123 L.Ed.2d 598, 605 and [n. 2], 113 S.Ct. 1913 (1993); *Bailey v. United States*, 516 U.S. ___, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995).

1B.) The Burden Of Proving The Extraordinary Justification Needed To Sustain A Sufficient, But Not Greater Than Necessary Outside-Guidelines Sentence For Mr. Rader Violated *Booker* And *Rita* And Resulted In The Reimposition Of Mandatory Guidelines In His Case.

United States v. Booker, 543 U.S. 220, 125 S. Ct. 738; 160 L. Ed. 2d 621; 2005 U.S. LEXIS 628 (1-12-05) required an "effectively advisory" Guidelines system to negate the mandatory nature of the presumptive regime in 18 U.S.C. § 3553(b)(1) "that require[d] sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure)." 543 U.S. at 258. The limited departures allowed by Section 3553(b)(1), based on circumstances "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines" had the practical effect of making departures unavailable in most cases. 543 U.S. at 234. Thus district courts' limited departure discretion was available in too few cases to render the system advisory in the manner that Booker deemed necessary to cure the Sixth Amendment violation. Similarly, the discretion possessed by Washington state trial judges in deciding whether "compelling" circumstances existed to depart from that state's Guidelines system failed to prevent the Sixth Amendment violation created by that jurisdiction's mandatory sentencing scheme.

See *Blakely v. Washington*, 542 U.S. 296, 305 n.8 (2004). "The availability of a departure in specified circumstances does not avoid the constitutional issue, just as it did not in *Blakely* itself." *Booker*, 543 U.S. at 234.

Limitation of the district courts' discretion to sentence below the Guidelines by requiring justification "proportional to the extent of the difference between the advisory range and the sentence imposed", however, has distorted *Booker's* remedy by severely shrinking the discretion district courts have to impose sentences below the levels required by Guidelines mandated and judicially-determined facts. By definition, extraordinary circumstances can exist in only a few cases. Thus, a rule requiring extraordinary circumstances to sentence below the Guidelines, removes the discretion essential to an advisory Guidelines system. *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738; 160 L. Ed. 2d 621; 2005 U.S. LEXIS 628 (1-12-05).

In fact, the prior departure standards may have allowed greater discretion than the new extraordinary circumstances threshold for non-Guidelines sentences. Even the "mandatory" Guidelines placed "essentially no limit on the number of potential factors that may warrant a departure." *Koon v. United States*, 518 U.S. 81, 106 (1996) (quoting *Burns v. United States*, 501 U.S. 129, 136-37 (1991)).

Even under a mandatory Guidelines system, the Court rejected the government's effort to limit district courts' departure discretion by requiring departures to be justified by facts advancing a specific goal under 18 U.S.C. § 3553(a). See *Koon*, 518 U.S. at 108. Such a limitation on departure authority is quite similar to the "extraordinary circumstances" requirement, yet this Court rejected it. *Id.* Instead, *Koon* provided a definition of reasonableness drawn directly from section 3553(a)'s command that district courts balance sufficiency and necessity:

> The statute requires a court to consider the listed goals in determining 'the particular

> sentence to be imposed' .... The statute says nothing about requiring each potential departure factor to advance one of the specified goals. So long as the overall sentence is 'sufficient, but not greater than necessary, to comply' with the above-listed goals, the statute is satisfied.

Koon, 518 U.S. at 108

The crucial point is satisfying the statute, 18 U.S.C. § 3553(a) for *Booker* holds that the sentencing discretion that 18 U.S.C. § 3553(a) affords creates an advisory system consistent with Sixth Amendment requirements. *Booker*, 543 U.S. at 233, 245.

Consequently, the rule requiring "extraordinary circumstances" to justify arithmetically substantial variances below the Guidelines range frustrates and subverts the discretion essential to this advisory system's constitutionality. *Id.*

In Mr. Rader's case, as set forth above, he was sentenced within the guideline sentencing range because of the "extraordinary circumstances" rule. Consequently, his sentence is violative of the Sixth Amendment. *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738; 160 L. Ed. 2d 621; 2005 U.S. LEXIS 628 (1-12-05).

Mr. Rader's case, in fact and law, falls four-square within the circumstances which caused this Court to accept certiorari in *Gall v. United States*, No. 06-7949; 2007 U.S. LEXIS 7525 (6-11-07). For this reason, the case should be held in abeyance pending this Court's decision in *Gall* and then disposed of as appropriate in light of that pending decision.

CONCLUSION

For all of the foregoing reasons, Petitioner Mark Rader respectfully prays that his Petition for Writ of Certiorari be **GRANTED** and the case set for argument on the merits.

Alternatively, Petitioner respectfully prays that this Court hold his case in abeyance pending the resolution of *Gall v. United States*, No. 06-7949; 2007 U.S. LEXIS 7525 (6-11-07) and then **REMAND** for reconsideration in light of the Court's disposition of that case.

Mark Rader
Petitioner
75226-004
P.O. Box 1031
Coleman, FL 33521

Date: _____

No.

Supreme Court of the United States

MARK RADER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX

COMES NOW PETITIONER **Mark Rader** and submits the attached appendix pursuant to Supreme Court Rules.

Mark Rader
Petitioner
75226-004
P.O. Box 1031
Coleman, FL 33521

Date: _____

APPENDIX A

ORDER & JUDGMENT OF THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED 5-31-07

2007 U.S. App. LEXIS 12791, *

UNITED STATES OF AMERICA, Plaintiff-Appellee, versus MARK TODD RADER, Defendant-Appellant.

No. 06-11348 Non-Argument Calendar

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

2007 U.S. App. LEXIS 12791

May 31, 2007, Decided

May 31, 2007, Filed

NOTICE: [*1] PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: Appeal from the United States District Court for the Southern District of Florida. D. C. Docket Nos. 05-14047-CR-JEM & 05-14077 CR-JEM.

DISPOSITION: AFFIRMED.

CASE SUMMARY:PROCEDURAL POSTURE: Defendant appealed his concurrent 151-month terms and a 120-month term imposed by the United States District Court for the Southern District of Florida after he pleaded guilty to child pornography and related crimes under 18 U.S.C.S. §§ 2252, 2252A, and 2422(b). The district court also imposed a § 17,500 fine.

OVERVIEW: Defendant contended that his sentences were not reasonable and that the district court failed to consider his ability to pay the fine. On review, the court found no reversible error. Defendant did not meet his burden of showing that his sentence was substantively unreasonable in that the district court stated that it considered the statements of the parties, the presentence investigation report, testimony regarding a physical and mental evaluation, the U.S. Sentencing Guidelines Manual, and the factors of 18 U.S.C.S. § 3553(a). The court found that the analysis of the § 3553(a) factors was sufficient. The court was not left with the definite and firm conviction that the decision to impose a sentence at the low end of the Guidelines was unreasonable

due to the number of links and images recovered from defendant's computer. Additionally, the court found that the evidence supported the finding that there were assets available for the payment of the fine under U.S. Sentencing Guidelines Manual § 5E1.2 and that defendant did not meet his burden in establishing his inability to pay. Defendant's debt allegedly owed to his father did not alter the decision to impose a fine.

OUTCOME: The court affirmed defendant's sentences.

COUNSEL: For Mark Todd Rader (75226-004), Appellant: Richard F. Della Fera, Entin & Della Fera, P.A., FORT LAUDERDALE, FL.

For United States of America, Appellee: Harriett R. Galvin, Lisette M. Reid, MIAMI, FL; Anne R. Schultz, U.S. Attorney's Office, MIAMI, FL.

JUDGES: Before WILSON, PRYOR and FAY, Circuit Judges.

OPINION

PER CURIAM:

Pursuant to a plea agreement, Mark Todd Rader pleaded guilty to one count of transporting or mailing a visual depiction the production of which involves the use of a minor engaging in sexually explicit conduct, in violation of 18 U.S.C. § 2252(a)(1), one count of using a facility and means of interstate commerce to persuade, induce, entice, or coerce a minor to engage in sexual activity, in violation of 18 U.S.C. § 2422(b), and one count of possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B). Rader appeals [*2] his 151-month sentence, which consists of concurrent 151-month terms on the first two offenses and a 120-month term for possession of child pornography. Rader argues that his sentence was not reasonable because the record does not demonstrate that the court considered the factors in 18 U.S.C. § 3553(a) and the meritorious sentencing arguments. He further challenges the reasonableness of his sentence on the ground that the district court did not

adequately consider his history and characteristics. Rader also appeals the district court's imposition of a $ 17,500 fine, arguing that the court did not make any specific findings concerning his ability to pay a fine and the record does not contain sufficient evidence to support the $ 17,500 fine imposed, as the court only stated that he could pay while working in prison and there was no evidence that a prisoner's rate of pay could satisfy this fine. For the reasons set forth more fully below, we affirm.

We review the final sentence imposed by the district court for reasonableness. *United States v. Winingear*, 422 F.3d 1241, 1245 (11th Cir. 2005). Unreasonableness may be procedural, when the court's [*3] procedure does not follow Booker's[1] requirements, or substantive. See *United States v. Hunt*, 459 F.3d 1180, 1182 n.3 (11th Cir. 2006). When evaluating the reasonableness of a sentence, we consider the factors outlined in 18 U.S.C. § 3553(a) and the district court's reasons for imposing the particular sentence. *United States v. Williams*, 456 F.3d 1353, 1360-61 (11th Cir. 2006), pet. for cert. filed, (U.S. Oct. 19, 2006) (No. 06-7352). When imposing a sentence, the district court must first correctly calculate the Guidelines. *United States v. Talley*, 431 F.3d 784, 786 (11th Cir. 2005). Second, the district court must consider the following factors to determine a reasonable sentence:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant, (2) the need to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (3) the need for deterrence; (4) the need to protect the public; (5) the need to provide the defendant with needed educational or vocational training or medical care; (6) the kinds [*4] of sentences available; (7) the Sentencing Guidelines range; (8) pertinent policy statements of the Sentencing Commission; (9) the

need to avoid unwanted sentencing disparities; and (10) the need to provide restitution to victims.

Id. (citing 18 U.S.C. § 3553(a)). While the district court must consider the § 3553(a) factors, it is not required to discuss each factor. Id. "[A]n acknowledgment by the district court that it has considered the defendant's arguments and the factors in section 3553(a) is sufficient under Booker." Id.

FOOTNOTES

1 *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

"[T]here is a range of reasonable sentences from which the district court may choose" and the burden of establishing that the sentence is unreasonable in light of the record and the § 3553(a) factors lies with the party challenging the sentence. *Id.* at 788. "The weight to be accorded any given § 3553(a) factor is a matter committed [*5] to the sound discretion of the district court[,]" and we will not "substitute our judgment in weighing the relevant factors because our review is not de novo." *Williams*, 456 F.3d at 1363 (citation, quotation marks, and alteration omitted). Although a sentence within the Guidelines range is not per se reasonable, the use of the Guidelines remains central to the sentencing process and we ordinarily expect a sentence within the Guidelines range to be reasonable. *Talley*, 431 F.3d at 787-88. However, the district court's choice of a sentence is not unfettered. *Williams*, 456 F.3d at 1363. "When reviewing the length of a sentence for reasonableness, we will remand for resentencing if we are left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case." *Id.*

With regard to the procedural reasonableness of Rader's sentence, the district court stated that it considered the statements of the parties, the presentence investigation

report ("PSI"), the [*6] objections, the matters discussed at sentencing, Dr. Susan Bollinger's evaluation and her testimony regarding Rader, the advisory Guidelines, which the court believed must be given great weight, and the § 3553(a) factors. The district court's analysis of the § 3553(a) factors was sufficient. See *Talley*, 431 F.3d at 786 ("[A]n acknowledgment by the district court that it has considered the defendant's arguments and the factors in section 3553(a) is sufficient under Booker.").

Rader has not met his burden of establishing that his sentence is substantively unreasonable. On appeal, Rader points to his military and civilian careers, his mental and physical conditions, and the evidence he presented that his conduct in committing these offenses was an aberration from his character. The district court was presented with arguments and evidence in support of Rader's good character and the problems he experienced, which he claimed contributed to his aberrant behavior in this offense. Although presented with this evidence, the court was entitled to give greater weight to other § 3553(a) factors. See *Williams*, 456 F.3d at 1363 ("The weight to be accorded [*7] any given § 3553(a) factor is a matter committed to the sound discretion of the district court."). The court rejected the government's request for a sentence at the middle of the 151 to 188-month Guidelines range. Instead, Rader received a sentence at the low end of the Guidelines. The court explicitly discussed the advisory Guidelines and the need to deter Rader from future criminal conduct. Moreover, despite evidence of Rader's good character, the "aberrant" behavior does not consist solely of a few days of conversation with an undercover officer. The evidence includes several links to the video Rader sent to the undercover officer, a video of an adult male having sexual contact with a child who appeared to be between two and four years' old, and 84 images of child pornography that were recovered from Rader's computer. In this case, we are not "left with the definite and firm conviction" that the district

court's decision to impose a sentence at the low end of the Guidelines was unreasonable. Williams, 456 F.3d at 1363.

We review the district court's finding that a defendant is able to pay a fine for clear error. *United States v. McGuinness*, 451 F.3d 1302, 1307 (11th Cir. 2006). [*8] The defendant has the burden of proving an inability to pay. *Id.*

The Guidelines state that "[t]he court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine." U.S.S.G § 5E1.2(a). The court may waive or reduce a fine if the defendant establishes either "that (1) he is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay all or part of the fine required by the preceding provisions, or (2) imposition of a fine would unduly burden the defendant's dependents . . . ." Id. § 5E1.2(e). In determining the amount of the fine, the district court must consider the factors in § 5E1.2(d). These factors include: the defendant's ability to pay, in light of his earning capacity and financial resources; the burden on the defendant and his dependents; whether restitution is ordered; and the need to reflect the seriousness of the offense, promote respect for the law, and provide just punishment and adequate deterrence. Id. § 5E1.2(d). The district court is not required to make express specific findings as to [*9] each of these factors. *United States v. Hunerlach*, 258 F.3d 1282, 1288 (11th Cir. 2001). We will not reverse for failure to make specific findings so long as "the record contains sufficient information with respect to the [§ 5E1.2(d)] factors to permit us to find that the district court did not clearly err in imposing or in setting the amount of the fine . . . ." *United States v. Lombardo*, 35 F.3d 526, 530 (11th Cir. 1994).

Before imposing a fine, the district court found that Rader was able to pay a fine and the record contains sufficient information to permit our review of the court's finding. In this case, the PSI contained information regarding Rader's financial resources and obligations. Rader provided additional financial information in his sentencing

memorandum and, following imposition of the fine, objected on the ground that he owed a substantial debt to his father. At the beginning of the sentencing hearing, the court indicated that it reviewed the PSI and Rader's sentencing memorandum. Before imposing Rader's sentence, the court stated that it had considered the PSI and Rader's objections. This information is sufficient to permit our [*10] review.

After the court imposed a fine, Rader objected and inquired as to whether the court would alter its imposition of a fine based on his "substantial debt" to his father. The court responded: "No. If he can't pay it, he can't pay it. That's a different thing. He pays or he doesn't pay. He's going to be in prison. He's going to be earning minimal, if he wants to work. So he can pay it from what he has." Rader interprets this comment to refer to his ability to pay a fine based on his prison earnings. Although the court's statement is ambiguous, given the context in which it was made, it appears that the court was explaining why Rader's debt to his father did not alter its decision to impose a fine. In any event, Rader's reliance on this comment does not establish that the court clearly erred in imposing a fine. The probation officer concluded that Rader appeared to have the present ability to pay a fine based on his current financial situation. On appeal, Rader makes no arguments as to his ability to pay based on that situation. We have reviewed the PSI, the information Rader provided regarding his finances in his sentencing memorandum, and his general assertion that he owed a [*11] "substantial debt" to his father. The evidence supports the finding that there were assets available for the payment of a fine and that Rader did not meet his burden of establishing his inability to pay. Accordingly, we hold that the district court did not clearly err in finding that Rader was able to pay a fine.

In light of the foregoing, Rader's sentences are AFFIRMED.

APPENDIX B

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA ENTERED 2-9-06

ENTERED FEBRUARY 09, 2006

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FT. PIERCE DIVISION

JUDGEMENT IN A CRIMINAL CASE

UNITED STATES OF AMERICA,
v.
MARK TODD RADER

Case Number: 05-14047-CR-MARTINEZ(s)
Case Number: 05-14047-CR-MARTINEZ

USM Number: 75226-004

Counsel For Defendant: Valentin Rodriguez Jr., Esq.
Counsel For The United States: Corey Steinberg
Court Reporter: Larry Herr

The defendant pleaded guilty to Count(s) 1 & 2 of the Superseding Indictment.
The defendant pleaded guilty to Count(s) 1 & 2 of the Information.
The defendant is adjudicated guilty of the following offense(s):

Title & Section: 18 U.S.C. §2252(a)(1)
Nature of Offense: Transporting or mailing a visual depiction the production of which involves the use of a minor engaging in sexually explicit conduct
Offense Ended: May 18, 2005
Count: One 05-14047-CR-Martinez
Title & Section: 18 U.S.C. §2422(b)

Nature of Offense: Using a facility and means of interstate commerce to persuade, induce, entice or coerce a minor to engage in sexual activity
Offense Ended: May 22, 2005
Count: Two 05-14047-CR-Martinez
Title & Section: 18 U.S.C. §2252(A)(a)(5)(B)
Nature of Offense: Possession of child pornography
Offense Ended: May 31, 2005
Count: One 05-14047-CR-Martinez

The defendant is sentenced as provided in the following pages of this judgement. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.
Count(s) 2 and 3 in Case Number 05-14047-CR-Martinez are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of imposition of Sentence: February 6, 2006

Signature of Judicial Officer
/SS/
Name and Title of Judicial Officer:
JOSE E. MARTINEZ
United States District Judge
February 9, 2006

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a

term of 151 months as to each of Counts One mad Two of Case No. 05-14047-CR-Martinez(s) and 120 months as to Count One of Case No. 05-14077-CR-Martinez, to be served concurrently,

The Court makes the following recommendations to the Bureau of Prisons:

This defendant shall be designated to a facility near Central Florida, that is commensurate with his sentence and background.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

_____

UNITED STATESMARSHAL

By

_____

Deputy U S Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release fox a term of 10 years as to each of Counts One and Two of Case No. 05-14047-CR-Martinez(s) and Count One of Case No. 05-14077-CR-Martinez, all such terms to run concurrently..

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the Court or probation officer.
2. The defendant shah report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4. The defendant shall support his or her dependents and meet other family responsibilities.
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or ether acceptable reasons.

6. The defendant shall notify the probation officer ten days prior to any change m residence or employment.
7. The defendant shall refrain from excessive use of alcohol.
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer.
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a taw enforcement officer.
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

The defendant shall register with the state sex offender registration agency in any state where the defendant resides, is employed, carries on a vocation, or is a student, as directed by the probation officer. The probation officer will provide the state officials with any and all information required by the state sex offender registration agency and

may direct the defendant to report to that agency personally for additional processing, such as photographing and fingerprinting.

The defendant shall not possess or use any data encryption technique or program.

The defendant shall consent to the U.S. Probation Officer conducting periodic unannounced examinations of the defendant's computer(s) equipment which may include retrieval and copying of all data from the computer(s) and any internal or external peripherals to ensure compliance with this condition and/or removal of such equipment for the purpose of conducting a more thorough inspection; and consent at the direction of the U.S. Probation Officer to have installed on the defendant's computer(s), at the defendant's expense, any hardware or software systems to monitor the defendant's computer use.

The defendant shall not possess or use a computer that contains an internal modem and/or possess an external modem without the prior approval of the U.S. Probation Officer.

The defendant shall consent to third party disclosure to any employer or potential employer, concerning any computer-related restrictions that are imposed upon the defendant.

The defendant shall submit to a search of his person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

The defendant shall have no unsupervised, personal, mail, telephone, or computer contact with children/minors under the age of 18, or with the victim in this case.

The defendant shall not be involved in any children's or youth organization.

The defendant shall participate in a sex offender treatment program to include psychological testing and polygraph examination. Participation may include inpatient/outpatient treatment, if deemed necessary.

The defendant shall not buy, sell, exchange, possess, trade, or produce visual depictions of minors or adults engaged in sexually explicit conduct.

The defendant shall not correspond or communicate in person, by mail, telephone, or computer, with individuals or companies offering to buy, sell, trade, exchange, or produce visual depictions of minors or adults engaged m sexually explicit conduct.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments.

Total Assessment: $300.00
Total Fine: $17,500
Restitution: $

*Findings for the total mount of losses are required under Chapters 109A, 110, 110A, and ll3A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of $300.00 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the U.S. COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
301 N. MIAMI AVENUE, ROOM 150
MIAMI, FLORIDA 33128

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Forfeiture of the defendant's right, title and interest in certain property is hereby ordered consistent with the plea agreement of forfeiture. The United States shall submit a proposed order of forfeiture within three days of this proceeding.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal,(5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.